No. 84-1044

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
TOWARD UTILITY RATE NORMALIZATION,
CONSUMERS UNION,
CONSUMERS FEDERATION OF CALIFORNIA,
COMMON CAUSE OF CALIFORNIA,
CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, AND
CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS,
Appellees.

On Appeal From The Supreme Court Of California

BRIEF OF APPELLANT PACIFIC GAS AND ELECTRIC COMPANY

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May 30, 1985

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QUESTION PRESENTED

Does an order of a state public utilities commission violate the First Amendment of the Constitution of the United States by compelling a privately-owned public utility to include in its monthly billing envelope the messages of a third party?

THE PARTIES TO THIS PROCEEDING

The parties to this proceeding are: (1) Pacific Gas and Electric Company (hereinafter "PGandE" or "appellant"); (2) Public Utilities Commission of the State of California (hereinafter "CPUC" or "commission"); (3) California Association of Utility Shareholders (hereinafter "CAUS"); and (4) Toward Utility Rate Normalization (the real party in interest), Consumers Union, Consumers Federation of California, Common Cause of California, California Public Interest Research Group (collectively referred to hereinafter as "TURN").

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OPINIONS BELOW

The denial of the Writ of Review by the Supreme Court of California, which appears in the Appendix to the Jurisdictional Statement (J.S., app., p. 73) is not reported. The opinions of the CPUC dated December 20, 1983, (Dec. No. 83-12-047; J.S., app., p. 1) as modified on May 2, 1984, (Dec. No. 84-05-039; J.S., app., p. 45) are printed in the Appendix to the Jurisdictional Statement and in the Appendix to the Commission's Motion to Dismiss (Commission's M.D., app., pp. 1-56.)

JURISDICTION

This action challenges a decision of the commission, upheld by the Supreme Court of California, which orders appellant against its will to include in its monthly billing envelope the messages of a third party. Appellant appeals on the basis that the order is unconstitutional in that it violates its right of free speech as guaranteed by the First Amendment.

The judgment of the Supreme Court of California, denying appellant's Writ of Review, was entered on October 4, 1984. A Notice of Appeal to this Court was duly filed in the Supreme Court of California on November 5, 1984. The Jurisdictional Statement for this appeal was docketed in the U.S. Supreme Court on December 31, 1984. The jurisdiction of this Court to review this decision is conferred by Title 28, United States Code, Section 1257, subdivision (2). The following decision specifically sustains the jurisdiction of the Court to review the judgment on appeal in this case: *Atchinson Railway Co. v. Public Utilities Comm'n.*[1] *346 U.S. 346 (1953). Probable jurisdiction was noted by the Supreme Court of the United States on March 25, 1985.*

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[1] *Atchinson Railway* involved an appeal from an order of the Public Utilities Commission of California. The California Supreme Court, as in the present case, denied review; and the appellant appealed to this Court. In deciding the commission's order was equivalent to an act of the legislature for appeal purposes, the Court related:

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section One of the Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, Section 5 of the Constitution of the State of California:

> The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix

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> We think the Commission's orders must be treated as an act of the legislature for purposes of determining our jurisdiction under 28 U.S.C. § 1257(2) (1948). [Citations omitted] The Commission has construed § 1202 as authorizing these orders. . . . In sustaining the Commission's orders by denying writs of review, the Supreme Court of California upheld the statute as applied by the Commission, and the cases are properly here on appeal. (*Atchinson Railway Co. v. Public Utilities Comm.'n*, 346 U.S. 346, 348-349 (1953).)

Similar to *Atchinson Railway*, here, the commission has construed California constitutional and statutory authority as authorizing it to compel appellant to open its billing envelope to a third party. (Dec. No. 83-12-047; J.S., app., p. 1.)

> just compensation for utility property taken by eminent domain.

Article XII, Section 6 of the Constitution of the State of California:

> The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Section 701 of the California Public Utilities Code:

> The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

STATEMENT OF THE CASE

Factual Background

Appellant is regulated by appellee, the Public Utilities Commission of the State of California, which was established pursuant to Article XII of the California Constitution. Charged with the duties and responsibilities that the Legislature has delegated to it in the Public Utilities Code of California, (Cal.Const., art. XII § 5) appellee's primary function is to regulate the rates and quality of services of utilities, including appellant.

A large investor-owned, combined gas and electric utilities, appellant, incorporated in 1905, serves 48 of California's 58 counties (electric-47, gas-37). 3.6 million electric customers and 2.9 million gas customers receive service from appellant who has a responsibility to communicate with these customers on numerous matters, including appellant's ability to provide reliable and efficient service.

As a necessary adjunct to providing utility service, appellant, since December 1923, has published a monthly newsletter called

PGandE Progress (*Progress*).[2] This publication is appellant's primary means of communicating with its customers. Through *Progress*, conservation messages and suggestions are conveyed, rate changes explained, and questions of general concern are answered. In addition, *Progress* occasionally carries articles that are unrelated to appellant's business, but are of general public interest. (See J.S. app., pp. 183-190.)

Progress is currently circulated to 3.7 million households. It is mailed each month to customers in the billing envelope at no additional cost to ratepayers. The cost of printing *Progress* is borne by stockholders and is not one of the estimated costs used to calculate rates.

Under existing United States postal regulations, a bill must be sent by first-class mail at a cost of sixteen and one-half (16.5¢) to seventeen (17¢) cents.[3] For this cost, which is the minimum first-class rate, up to one ounce of material may be included in the envelope. A bill, even though weighing less than one ounce, cannot be mailed for less than the first-class rate.

Included with each mailing is the bill itself, the envelope in which it is mailed to the customer, a self-addressed return envelope in which the customer can return payment to PGandE, and an occasional legal notice. Because these items weigh less than one ounce, appellant for the last sixty (60) years, has included *Progress* in its billing envelope without incurring any additional costs.

Proceedings Below

The present case has its origin in appellant's 1982 general rate case, Application No. 60153, et al. (J.S., app., p. 63.) In that proceeding, Toward Utility Rate Normalization (TURN), a

[2] A recent edition of *Progress* is included in the appendix to the Jurisdictional Statement (J.S., app., p. 183).

[3] The 17 cent postage charge applies to mail that is presorted by six digit zip code. The 16.5 cent postage charge applies to mail presorted by nine digit zip code.

frequent intervenor in appellant's rate proceedings, contended that PGandE had violated 16 United States Code section 2623, subsection (b)(5) and 16 United States Code section 2625, subsection (h) of the Public Utility Regulatory Policy Act (PURPA) by including political communications in its billing envelope and in the envelope used to mail dividends to appellant's shareholders. (J.S., app., p. 64.)

In Decision No. 93887, 7 Cal. P.U.C. 2d 349 (1981) modified by Decision No. 82-03-047, 7 Cal. P.U.C. 2d 349 (1982)[4] the commission found that from time to time *Progress* contained items that could be considered political comment. (*Id.*; J.S., app., pp. 64-65.) The CPUC, although recognizing that *Progress* is printed at shareholder's expense and is sent in the envelope without additional cost to the ratepayers, nevertheless concluded that there are or may be many other uses for the "extra space."[5] Since *Progress* is sent in the billing envelope, the commission decided that the ratepayers lose the "opportunity cost" of using the envelope. (Dec. No. 93887; J.S., app., p. 68.) In findings of fact number 58, the commission held that the "extra space" in the envelope "is properly considered as ratepayer property." (*Id.*; J.S., app., p. 72.)

The CPUC then examined how the "extra" space could be used more efficiently so ratepayers could realize this "opportunity cost." It considered: (1) banning *Progress*; (2) establishing a "public access mechanism" requiring the utility to allow TURN or other groups to reply to political messages; (3) charging PGandE a fee for use of the "extra" space whenever PGandE engaged in political speech; or (4) auctioning off the "extra"

[4] The pertinent portions of Dec. No. 93887 are reprinted in the Appendix to the Jurisdictional Statement. (J.S., app., p. 63.)

[5] Specifically, the commission defined:

> 'extra space' as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would result in any additional postage cost. (Dec. No. 83-12-047; J.S., app., p. 3.)

space to the "highest reputable commercial advertiser." (*Id.*; J.S., app., pp. 66-71.) The commission did not, however, choose any of these "solutions." [6] Rather it invited:

> . . . TURN or any other interested party to file an application with this Commission with a proposed solution to the 'extra' space problem. *The application would seek an order from us to the utilities, such as PGandE, that they utilize the economic value of the 'extra space' more efficiently for ratepayers' benefit.* We caution, however, that we will not lightly adopt such an order that *the considerable First Amendment problems must be fully addressed* in such application. (*Id.*; J.S., app., p. 71.) (emphasis added).

On May 31, TURN filed a complaint with the CPUC (Docket No. 83-05-13; J.S., app., p. 75) requesting access to appellant's billing envelope no fewer than four times per year for a two-year period for the purpose of including a "Consumer Advocacy Checkoff" proposal for a financial solicitation.[7] The "Consumer

[6] Shortly after issuing Decision No. 93887, the commission granted a request to use the "extra space" in the billing envelopes of San Diego Gas and Electric Company (SDG&E) to solicit funds and create a consumer group to be called the San Diego Utility Consumers Action Network, Inc. (UCAN). (*Center For Public Interest Law v. SDG&E*, Decision No. 83-04-020, ___ Cal. P.U.C. 2d ___ (1983), J.S., app., p. 90; (hereinafter the "UCAN Decision").)

In reaching its decision in the UCAN case, the commission stated that the right involved is not so much a "traditional property right as an equity right." (J.S., app., p. 100.) Although stating that not everything paid for with ratepayer money is the sole property of the ratepayer, the commission did not give any guidance as to which payments give the ratepayers an equity interest in utility property and which do not. (J.S., app., p. 100.)

[7] TURN proposed three types of checkoff alternatives. The first two require the listing of various qualified consumer organizations. The main difference in the first two alternatives is the manner in which the qualified organizations are selected. The third alternative is less in the nature of a "checkoff." Under this alternative, only TURN is allowed to solicit funds. (J.S., app., pp. 85-86.)

Advocacy Checkoff" proposal was open *only* to qualified organizations representing residential customers, and any funds so acquired would have to be used in PGandE proceedings. (*Id.*; J.S., app., p. 82.) On August 8, 1983, appellant filed its motion to dismiss TURN's complaint contending, *inter alia*, that the requested relief was unconstitutional because it would violate appellant's rights protected by the First, Fifth and Fourteenth Amendments to the United States Constitution. The motion was denied. (Dec. No. 83-12-047; J.S., app., p. 9.)

On December 20, 1983, by a 4 to 1 vote, the commission issued Decision No. 83-12-047 (J.S., app., p. 1) declining to adopt two of TURN's Consumer Advocacy Checkoff proposals, but granting TURN access to appellant's billing envelope four times per year for a two-year period.[8] During such time, TURN's message must be accorded a priority position over *Progress*. (Dec. No. 84-05-039; J.S., app., p. 51.)

Decision No. 83-12-047 attempts to explain more clearly the commission's ephemeral view of the ratepayer's interest in the extra space in the billing envelope. First, the commission stated that it had not really held that the billing envelope itself is ratepayer property. (Dec. No. 83-12-047; J.S., app., pp. 3-4.) Rather, it surmised that the extra space in the envelope is more like an "artifact generated with ratepayer funds" (*Id.*; J.S., app., p. 3) which has economic value. Then, modifying this statement it said "the extra space is a by-product of the billing process which is paid for by ratepayers." (Dec. No. 84-05-039; J.S., app., p. 52.) And, to prevent appellent from benefitting from the extra space, reasoned the commission, as a matter of equity, it "is properly considered as ratepayer property." (*Id.*; J.S., app., p. 3.) Moreover, continued the commission, because of its past practice of requiring utilities to send legal, conservation, tax and rate notices in the billing envelopes it, therefore, had jurisdiction over the envelope extra space. (*Id.*; J.S., app., p. 47.) Specifically, the

[8] The commission found that it would be premature to adopt the "checkoff" proposals since only TURN had sought access to the PGandE billing envelope. (Dec. No. 83-12-047; J.S., app., p. 17.)

commission construed Article XII, Sections 5 and 6 of the California Constitution and California Public Utilites Code Section 701 as the constitutional and statutory authority for its order. (*Id.*; J.S., app., pp. 26-27; see also, Commission's M.D., app., pp. 57-59.)

Then, relying on its UCAN decision, the commission summarily rejected PGandE's First Amendment claims[9] and held that its action was a valid time, place and manner restriction, that the space belongs to the ratepayers and that its order was a narrowly-tailored means of serving the compelling state interest identified in the UCAN proceeding. (Dec. No. 83-12-047; J.S., app., pp. 20-22.) Asserting that the envelope space is the ratepayers' property, not PGandE's, the commission dismissed the Fifth Amendment taking issue. (*Id.*; J.S., app., p. 27.)

Applications for rehearing were filed by appellant and a number of other interested parties. On March 7, 1984, the commission issued Decision No. 84-03-045 (J.S., app., p. 62), extending its stay of the effectiveness of Decision No. 83-12-047. Thereafter, on May 2, 1984, by a 3-2 vote, the CPUC issued Decision No. 84-05-039 modifying Decision No. 83-12-047 and denying the requests for a new hearing. On June 4, 1984, Appellant filed its Petition For Writ of Review with the Supreme Court of California challenging the constitutionality of the order. On October 4,

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[9] Decision Numbers 83-12-047 (J.S., app., pp. 1-44) and 84-05-039 (J.S., app., pp. 45-61) are rife with references to the UCAN Decision. For example, Decision No. 83-12-047 adopts the so-called "compelling state interest" from the UCAN Decision. (Dec. No. 83-12-047; J.S., app., p. 22.) Decision No. 84-05-039 also quotes extensively from the UCAN Decision. This was done even though the commission specifically rejected requests for interventions in the UCAN proceeding by various utilities which alleged that the decision might affect them. The commission assured the utilities that the complaint would "in no way affect[ ] the rights and duties of other utilities." (Dec. No. 83-04-020; J.S., app., p. 96.) Despite this assurance, the commission used the UCAN decision as the primary basis for giving TURN access to appellant's billing envelope.

1984, the Supreme Court of California denied, without comment, appellant's Petition for Writ of Review. (J.S., app., p. 73.)

SUMMARY OF ARGUMENT

The decision below, compelling appellant to publish in its monthly billing envelope the messages of TURN, is not only repugnant, but strikes at the foundation upon which the First Amendment rests. It is well established that a state cannot compel a person to carry a message against his or her will. (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Wooley v. Maynard,* 430 U.S. 705 (1977).) The right to refrain from speaking and from associating with the messages of others is an essential part of the First Amendment. (*Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).) A utility, like other corporations, has a First Amendment right to exercise judgment as to the materials to be included in "its own billing envelopes." (*Consolidated Edison Co. v. Public Service Comm'n.,* 447 U.S. 530, 540 (1980).) And, when government seeks to regulate that right, its "action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (*Id.*) First Amendment principles cannot be evaded, as done below, by a state's ruling that the extra envelope space does not belong to PGandE, but rather to customers because they purchase that space when they pay their utility bills. Contrary to this ruling, customers do not pay for the property used to render service. (*Board of Public Utility Comm'rs. v. New York Telephone Co.*, 271 U.S. 23, 32 (1926).)

Even commercial speech of a utility falls within the protection of the First Amendment. (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980).) In *Central Hudson*, the Court held that the "State must assert a substantial interest" (*Id.* at 564) before it may regulate utility speech, and that "the regulatory technique must be in proportion to that interest." (*Id.*) Forcing appellant to communicate messages, which it chooses not to communicate, meets neither the *Consolidated Edison* nor the *Central Hudson* test. Whatever interest the State may have in regulating utility rates and services, that

interest cannot be legitimately pursued by mandating PGandE to communicate TURN's messages in its billing envelopes. (See *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. at 540.)

Any governmental intrusions into the sensitive area of speech activity will have a "deterrent effect on the exercise of First Amendment rights . . . not [necessarily] through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . ." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976). To guard against governmental intrusions into these fragile areas, "[e]xacting scrutiny is necessary whether or not the regulation is intended to limit the exercise of freedom of expression." (*Id.* at 23; see also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981).) By mandating PGandE to publish TURN's messages, the State has chosen a most drastic method for achieving its alleged interests. The chosen method not only infringes appellant's speech, but also puts the government in the business of picking and choosing speakers whose messages it will then require appellant to publish in its billing envelope.

The issue, therefore, before this Court is whether a state may, consistent with the First Amendment, force a privately-owned public utility to include in its monthly billing envelope the messages of a third party.

ARGUMENT

I

COMPELLING APPELLANT TO PUBLISH MESSAGES OF A THIRD PARTY IS UNCONSTITUTIONAL

A. Utilities Are Protected by the First Amendment

Restrictions placed upon corporate speech must pass constitutional muster. The First and Fourteenth Amendments guarantee that no State shall "abridg[e] the freedom of speech." (*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500-501 (1952).) In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), the Court put to rest the idea that corporations are not entitled to

free speech. *Bellotti* was specifically applied to utilities in *Consolidated Edison* which held that utilities, like banks and other corporations, are protected by the First Amendment:

> The restriction on bill inserts cannot be upheld on the ground that *Consolidated Edison* is not entitled to freedom of speech. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), we rejected the contention that a State may confine corporate speech to specified issues. That decision recognized that *'[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon* the *identity of its source, whether corporation, association, union, or individual.'* [citation omitted] (*Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 533.) (emphasis added).

B. The Decision Below Takes From Appellant Its First Amendment Right to Select the Content of Its Billing Envelopes.

For over half a century, PGandE has exercised discretion in selecting the content of its billing envelope. Through the billing envelope, appellant has distributed its monthly newsletter, *Progress*, which, *inter alia*, conveys conservation messages, explains rate changes, and responds to customers' general concerns.

The communications in *Progress* are precisely the type of communications that are protected by the First Amendment. (*Consolidated Edison Co.* v. *Public Service Comm'n.*, 447 U.S. 530.) Some articles in *Progress*, although intended to inform PGandE customers of various aspects of the energy picture, might be classified by some as "commercial" speech, but most articles are noncommercial. Regardless of how the contents of *Progress* are classified, it is nevertheless speech that falls within the ambit of the protection of the First Amendment. (See e.g., *Consolidated Edison Co.* v. *Public Service Comm'n.*, 447 U.S. at 533; *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n.*, 447 U.S. at 561; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976).)

Initially, the commission completely barred PGandE from using its billing envelope four times per year (Dec. No. 83-12-047; J.S., app., p. 17); but on rehearing, it modified its decision so that "PG&E will be permitted to continue to insert the *Progress* during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted." (Dec. No. 84-05-039; J.S., app., p. 51.) This concession is illusory because TURN is given the first opportunity to choose which months it wants to preempt the billing envelope. And, whether or not PGandE will be able to speak to its customers at all during those four months will hinge entirely upon TURN and its decision as to the length of its message, or the weight of paper that it uses. Commissioner Bagley, in his dissent, correctly observed:

> And now under the revised order TURN can determine, *solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder.* [citation omitted] Under this order we have the unseemly situation where *government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other.* That, compared to government proscription, is deprivation squared. (Dec. No. 84-04-039; J.S., app., pp. 59-60 (Bagley, dissenting).) (emphasis added).

As recognized by Commissioner Bagley, Decision No. 83-12-047 not only requires PGandE to carry TURN's message, but also severely restricts PGandE's ability to select the content of the billing envelope sent to its customers.[10] And, more importantly, it places that right in the hands of government. Professor Emerson has strongly warned that "governmental entanglement with the system of expression . . . is certain to end in severe repression of

[10] To this argument, the commission replies: "To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content." (Dec. No. 84-05-039; J.S., app., p. 51.)

communication." Emerson, *Legal Foundation of the Right to Know,* (1976) *Wash. U. L. Q.* 1, 13. The decision below not only takes from appellant its right to select the contents of its billing envelope, but also ensnarls government in selecting competing speakers for the envelope, thereby making government the ultimate arbitrator of what is communicated. (See discussion, *infra,* pp. 22-27.)

C. The First Amendment Prohibits Government From Compelling Speech and Association.

The guarantee of freedom of expression includes both the right to refrain from speaking and the concomitant right not to be associated with the speech of others. A compulsion to speak raises the same First Amendment issues as does a direct ban on speech. In *Wooley v. Maynard,* 430 U.S. at 714 this Court explained:

> We begin with the proposition that the right of freedom of thought . . . includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'* [citation omitted] (emphasis added).

The issue in *Wooley* was whether the State of New Hampshire could force the appellees (The Maynards) to display the State's message, "Live Free or Die," (*Id.* at 707) on their car's license plate. Like PGandE, the Maynards in *Wooley* objected vigorously to carrying someone else's message.[11] Relying on *Board of Education* v. *Barnette,* 319 U.S. 624 (1943), which held unconstitutional a statute requiring public school students to participate in

[11] By requiring PGandE to send its bill and TURN's message together, the commission has given TURN's message a status it cannot achieve on its own. Sent by itself, TURN's solicitation would be easily identified and quickly discarded or kept based on its own identily. The recipient of appellant's billing envelope, however, will peruse its contents

daily public ceremonies by honoring the flag with words and traditional gestures, the *Wooley* Court said that the "New Hampshire statute in effect requires that [the Maynards] use their private property as a 'mobile billboard' for the State's ideological message . . . . " (*Wooley v. Maynard,* 430 U.S. at 715.) Similarly, the decision below compels PGandE to use its property to communicate TURN's messages in disregard of its right "to refuse to foster, in any way . . . an idea [it] find[s] . . . objectionable."[12] (*Id.*)

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precisely because PGandE is sending the bill in it. After receiving a number of such solicitations, the customer may come to expect the envelope to contain third party solicitations and will act accordingly. Consequently, PGandE's messages may suffer irreparably from the forced association.

Recognizing the value of associating TURN's message with PGandE's envelope, the commission admitted that there is an "increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately." (Dec. No. 83-12-047; J.S., app., p. 3., n. 2.) But, even the "increased probability" that customers may read TURN's insert if put in PGandE's envelope is not sufficient justification to abridge PGandE's First Amendment rights. A similar argument in *City Council of Los Angeles v. Taxpayers for Vincent,* ____U.S. ___, 104 Sup.Ct. 2118, 2133 (1984), that "posting signs on {utility] property has advantages over [other] forms of expression" was rejected as an insufficient basis for allowing candidates for political office to place their signs on the City's utility poles.

[12] The State has gone one step further here than in *Wooley* by ordering appellant not to carry the State's message, but rather to carry that of a private entity (TURN). Even if appellant's property were publicly owned, which it is not, that fact would not create a right of access.

The commission's claim that a right of access is permissible as a regulation of a nonpublic forum (Commission's M.D., p. 20) is without merit. *Perry Educational Association v. Perry Local Educators Ass'n,* 460 U.S. 37 (1983), cited for this proposition, lends no support. Justice White, writing for the Court, distinguished the grant of access in *Perry,* which involved government property, from the right of access to a utility's billing envelope. "Indeed, in *Consolidated Edison,* which concerned a utility's right to use its own billing envelopes for speech

Abood v. Detroit Board Of Education, supra, 431 U.S. 209 is also applicable. It invalidated a state law permitting public agencies to require that contributions be made to union political activities as a condition of employment. The fact that the employees in *Abood* were compelled to contribute and associate, said the Court, rather than prohibited from contributing for political purposes, worked no less an infringement on their associational freedom. (*Id.* at 234-235.) The State cannot intrude into "the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control." (*Board of Education v. Barnette,* 319 U.S. at 642.)

Associational freedom is essential to the First Amendment " . . . whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . . " (*NAACP v. Alabama,* 357 U.S. 449, 460 (1958).) PGandE, like the school teachers in *Abood* is entitled to the associational protection of the First Amendment, "because [it too] has been prohibited, not from actively associating, but rather from refusing to associate." (*Abood v. Detroit Board of Education,* 431 U.S. at 234) This violates PGandE's associational freedom. (See *United States v. Robel,* 389 U.S. 258, 265-266 (1967).)

Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 254 rejected the idea that a state may compel a newspaper to publish the message of a third party. In *Miami Herald,* a Florida statute required newspapers to grant a right of reply to press criticisms of a candidate for nomination or election. The Court specifically repudiated the government's argument that it had a compelling interest in enforcing a right of access in order to enhance a variety of viewpoints. Chief Justice Burger, writing for the Court, observed:

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purposes, the Court expressly distinguished our public forum cases, stating that '*the special interest of a government in overseeing the use of its property' were not implicated.*" (460 U.S. at 49, n. 9.) (emphasis added). Here, TURN seeks not to utilize government property, but rather that of a private property owner. Thus, *Perry* is of no avail.

> However much validity may be found in these arguments, at each point, the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years. (*Id.* at 254.)

Almost thirty years before *Miami Herald* was decided, the Court, in *Associated Press v. United States,* 326 U.S. 1(1945), "foresaw the problems relating to government-enforced access." (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. at 254.) *Associated Press* intimated that a person should not be compelled to publish that which reason tells him or her not to publish. (326 U.S. at 20, n.18.) Here, the same principle applies because the government-enforced right of access is specifically predicated on governmental officials compelling PGandE against its will to publish[13] the messages of speakers selected by the government. This brings about a clear confrontation with appellant's right not to speak and associate.

In *Miami Herald* the right to refrain from speaking, and indirectly the right not to associate, was at issue. The Court recognized, as it must here, that the "[a]ppellees argument that the Florida statute [did] not amount to a restriction of appellant's right to speak because 'the statute in question [had] not prevented the *Miami Herald* from saying anything it wished' [citation omitted] begs the core question." (418 U.S. at 256.) The answer to that core question applies equally here:

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[13] The commission maintains incorrectly that it is not ordering PGandE "to publish" TURN's message, but rather is merely allowing TURN to use the available space in the billing envelope. (Dec. No. 83-12-047; J.S., app., p.23) This view of "publishing" is inconsistent with law. Black's Law Dictionary, Fourth Edition, defines "publish" as: "to make public; to circulate; to make known to people in general." And, in *Western States Newspapers, Inc. v. Gehringer,* 203 Cal.App.2d 793, 797-798, 22 Cal. Rptr. 144, 147 (1962), to publish was held to mean "to disclose, reveal, proclaim, circulate or make public."

> Compelling editors or publishers to publish that which 'reason tells them should not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specific matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. [citation omitted] (418 U.S. at 256.)

Similarly, compelling PGandE to publish or distribute materials selected or printed by TURN operates in much the same manner as telling PGandE what it can and cannot publish or distribute. (*Id.*) It takes from appellant not only its right to refuse to publish or associate with the messages of others, but also places an "affirmative duty upon" (*Wooley v. Maynard,* 430 U.S. at 714) appellant to publish and to associate with others. The crux, however, of the *Wooley* decision, which relied on *Miami Herald,* was that the state's interest in displaying the state's slogan, there, no matter how acceptable to some, could not "outweigh an individual's First Amendment right to avoid becoming the courier of such message." (*Id.* at 717.) Thus, the State's alleged interest here in providing TURN with an adequate fund raising mechanism cannot outweigh PGandE's right to refuse to become the "courier" of TURN's messages.

Nor does the Court's decision in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980) offer support for the commission's decision. The issue in *PruneYard* was "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, violate the shopping center owner's" (*Id.* at 76) protected rights. Upholding the right to petition at the shopping center, the Court observed, "The PruneYard is a large commercial complex that covers several city blocks, contains numerous, separate business establishments, and is open to the public at large." (*Id.* at 83.)

Rejecting the shopping center owner's argument that he had a "First Amendment right not to be forced by the state to use his property as a forum for the speech of others," (*Id.* at 85) the

Court, distinguishing *Wooley*, noted that "the shopping center by choice of its owner" (*Id.* at 87) is "a business establishment that is open to the public to come and go as they please." (*Id.*) Most importantly, continued the Court, "the views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner." (*Id.*) Unlike in the instant case, there was no likelihood in *PruneYard* that the messages of petitioners at a shopping mall would be confused with those of the mall's owner.

But, here, in contrast to the shopping center in *PruneYard*, which covered approximately 21 acres and could accommodate all speakers, there are significant problems inherent in forcing PGandE to put TURN's messages in the limited space of its billing envelopes.[14] The PruneYard Shopping Center is clearly

[14] The decision below places appellant in a dilemma. This was acknowledged by the commission in decision No. 93887:

> *We [commission] also are concerned* that we do not have in place a fair mechanism for determining just who should be allowed to respond to PG&E. Should it be TURN? California Retailers Association? Citizen Action League? *Perhaps we should allow for a lottery to determine such opportunity . . . However, we think this would simply result in chaos and confusion. (Id.;* J.S., app., p. 70.) (emphasis added).

California courts have held that, under the California Constitution, if one party is granted access to private property, then all other parties similarly situated also must be granted that same right of access. In *Laguna Publishing Co. v. Golden Rain Foundation*, 131 Cal.App.3d 816, 182 Cal. Rptr. 813 (1982), the court faced the issue whether the private residential community of Leisure World could allow one newspaper in and keep out all other similar papers. Holding such discrimination to be impermissible, the court stated:

> In other words, Golden Rain, *in the proper exercise of its private property rights, may certainly choose to exclude all* give-away, unsolicited newspapers from Leisure World, *but once it chooses to admit one . . . then the discriminatory exclusion of another such newspaper represents an abridgement of the free speech, free press rights of the excluded newspapers secured under our state Constitution. (Id.* at 843, 182 Cal. Rptr. at 829.) (emphasis added).

distinguishable from a billing envelope. It is a huge place where everybody can congregate without interfering with the rights of the owners. This was recognized by the *PruneYard* Court. (*Id.* at 83.) Moreover, unlike a billing envelope, a shopping center is a place where all who wish to come and bring their pamphlets and leaflets can do so without governmental selection of the speakers and without the public thinking that the messages communicated reflect the views of the shopping mall's owner. In the present case, one speaker, TURN, is singled out by the state to present its views. It is highly likely that the public will receive a mistaken impression that the State's selection of TURN to send its message in the billing envelope is supported by PGandE. Even a disclaimer, as proposed by the commission (J.S. app., P. 23), would not remove this impression. Rather, a disclaimer would force PGandE to speak even though it prefers to remain silent.

In *PruneYard* a disclaimer was irrelevant because no one would think speakers at a shopping mall reflect the views of the owners of the mall. The instant case is analogous to *Wooley*. A disclaimer on the Maynards' license plates in *Wooley* would not have made permissible the forced association of the Maynards' with the State's message they found objectionable. Like the Maynards, PGandE is also being required "to be an instrument for fostering public adherence to an ideological point of view [it] finds unacceptable." (*Wooley v. Maynard*, 430 U.S. at 715.) A disclaimer on TURN's messages cannot remove this serious infringement upon personal liberties. (*Id.*) As stated by Justice Powell, a forced right of access takes away a person's right to refrain from speaking:

> The property owner or proprietor would be faced with a choice: he either could permit his customers to receive a

Accordingly, other groups who may wish to send their messages through PGandE's billing envelope would be entitled to equal consideration under California law. (See also, *U. C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal.App.3d 1157, ____ Cal. Rptr. ____ (1984).) This would force a steady, if not complete, erosion of the space available for appellant's messages.

> mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he has been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues. *The mere fact that he is free to dissociate himself from the views expressed on his property,* [citation omitted], *cannot restore his 'right to refrain from speaking at all.'* [citation omitted] (*Id.* at 99.) (emphasis added).

To be sure, a utility's less than one ounce billing envelope is not comparable to a large shopping center, which is unique and which "by choice of its owners is not limited to their personal use."[15] (*Id.* at 87) Moreover, a shopping center can accommodate thousands of different speakers without governmental entanglement in selecting the speakers. By contrast, the limited space in appellant's billing envelopes, which has always been limited to PGandE's private use and occasional legal notices, cannot accommodate outside speakers without governmental entanglement in selecting the speakers.

D. Permissible Time, Place or Manner Restrictions Do Not Empower a State to Force a Utility to Communicate the Messages of Third Parties.

The commission concluded that forcing PGandE to speak and to associate with TURN's message through the billing envelope was a permissible time, place and manner regulation. (Dec. No.

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[15] Justice Rhenquist, writing for the Court, stressed this factor:
> It bears repeated emphasis that we do not have under consideration the property or privacy rights of an indiviudal homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center]. A handful of additional orderly persons soliciting signatures and distributing handbills . . . would not markedly dilute defendant's property rights. (447 U.S. at 78.)

83-12-047; J.S., app., pp. 20-21.) In reaching this conclusion, it relied on language from *Consolidated Edison Co. v. New York Public Service Comm'n.,* 447 U.S. at 535, where this Court recognized " ' . . . the validity or reasonable time, place or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication' " (Dec. No. 83-12-047; J.S., app., p. 20). The commission's reliance, however, on *Consolidated Edison,* is totally misplaced. Time, place or manner restrictions apply only when regulating an already existing, independent right to exercise protected rights. (See *Cox v. New Hampshire,* 312 U.S. 569 (1941).) For example, if a person already has a right to exercise First Amendment privileges on a public sidewalk, that right can be limited so as not to obstruct or unreasonably interfere with the sidewalk or at a time that will not materially affect the normal business conducted there. (See *Grayned v. City of Rockford,* 408 U.S. 104 (1972).)

Under the commission's rationale, both *Wooley v. Maynard, supra,* 430 U.S. 705, and *Miami Herald Publishing Co. v. Tornillo, supra,* 418 U.S. 241, could have been required to carry third party messages by a mere reliance upon time, place or manner restrictions. New Hampshire, for example, could have resolved the *Wooley* case by using time, place or manner restrictions to require the Maynards to carry the State's slogan on their car's license plate; and Florida could have compelled the Miami Herald to publish reply messages as a time, place or manner restriction. Yet, neither of these cases discussed the doctrine and properly so. For, it is preposterous to argue, as the commission argues, that such restrictions create a forced right of access to the property of others.

Consolidated Edison soundly rejected New York's use of time, place or manner restrictions as a basis for limiting a utility's use of its own billing envelope. As stated in *Consolidated Edison,* "the essence of time, place or manner regulations lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. No matter what the message, a roving sound truck that blares at 2 a.m. disturbs neighborhood tranquility." (*Consolidated Edison Co. v. Public*

Service Comm'n., 447 U.S. at 536.) In other words, time, place or manner restrictions are applied to ensure that First Amendment rights are exercised reasonably so as not to interfere with the rights of others.

The commission's unsupported claim that compelling PGandE to carry TURN's message "would be a 'reasonable time, place or manner' restriction in that it requires PGandE to share the extra space with TURN for a purpose which significantly benefits ratepayers" (Dec. No. 84-05-039; J.S., app., p. 51) is not only illogical, but is similar to the argument made in *Consolidated Edison* to justify New York's "ban [of utility speech] on the grounds that consumers will benefit from receiving 'useful' information. . . ." (447 U.S. at 537.) Rejecting New York's use of such restrictions to justify an infringement of First Amendment rights, the Court observed: "The [New York] Commission's own rationale demonstrates that its action cannot be upheld as a . . . time, place or manner regulation." (*Id.*) Likewise, the decision below cannot be upheld as a permissible time, place or manner restriction.

E. In Reaching Its Conclusion as to the Most Efficient Use of the Envelope Extra Space the Commission Unlawfully Evaluated the Content of Speech.

The traditional view of the First Amendment is that it serves as a shield against the power of government to regulate the content or means of communication. First Amendment analysis starts with the proposition that communication is presumptively protected from governmental interference. (See L. Tribe, *American Constitutional Law* § 12-2 at p. 581 (1978).) Governmental neutrality toward communicators and the content of their communications is considered a "paramount obligation." (E.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70, (1976) (Stevens, J., plurality); see also, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. at 776 (Stewart, J., concurring).)

In the commission's view, its decision does "not require [it] to look at content at all" (Dec. No. 83-12-047; J.S., app., p. 21), but

a review of the decision refutes this claim. The avowed purpose of the proceeding below was to determine "how to use the economic value of the extra space more efficiently for ratepayers' benefit." (Dec. No. 83-12-047; J.S., app., p. 21; see also, Dec. No. 93887; J.S., app., pp. 68-70.) Measuring that efficiency, to be sure, requires content analysis:

> Our goal, as expressed in D. 93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. *It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E.* (*Id.;* J.S., app., p. 17.) (emphasis added).

Without evaluating content, how could the commission determine that publishing TURN's messages would be more beneficial than PGandE's use of the envelope extra space?[16] To reach its conclusion, the commission either had to weigh the value of TURN's speech against PGandE's speech, or to make an unsupported determination that TURN's messages would be a more efficient use of the envelope extra space. In either case, the commission's action was impermissible. If the commission

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[16] Not only did the commission evaluate the content of speech, it will continue to do so:

> The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, *we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new programs* along with any previously authorized ones. (Dec. No. 83-12-047; J.S., app., p. 19.) (emphasis added).

Determining whether the proposals are "meritorious," obviously requires the commission to consider the merits of the proposals. Yet, in granting TURN access, the commission states that it will not undertake to control TURN's messages. (*Id.;* J.S., app., p. 17.) But, if TURN makes misrepresentations or misleads the public by its inserts, the commission has no recourse but to police future inserts, or to suspend them. This is indeed censorship.

weighed TURN's message against PGandE's, it unlawfully evaluated the merits of the speech of the parties.[17] On the other hand, if it simply surmised that TURN's messages are more beneficial then it incorrectly relieved itself of the burden of demonstrating in the record why inserting TURN's messages is a more beneficial use of the envelope extra space.[18](See *Elrod v. Burns,* 427 U.S. 347, 362 (1976).)

This is a clear case where the government has placed itself in the role of selecting and licensing speakers to use PGandE's envelope based upon what they intend to say. TURN was chosen precisely because it represents a viewpoint directly opposite

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[17] By selecting the speaker for the billing envelope, the commission indirectly determines the content of the message to be communicated. Sanctioning this would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall,*357 U.S. 513, 526 (1958). Moreover, in *Regan v. Time, Inc.,* ____ U.S. ____, 82 L.Ed.2d 487 (1984) the Court stated that it is impermissible for a state to make determinations based on the newsworthiness or educational value of the speaker's message. (*Id.* at 494.) There, the Court recognized, as must be recognized here, that "[a] determination concerning the newsworthiness or educational value . . . cannot help but be based on the content . . . and the message it delivers . . . [O]ne . . . will be allowed and another disallowed solely because the government determines that the message being conveyed in . . . one is newsworthy or educational while the message imparted by the other is not." (Id.) Similarly, the commission can control the message communicated merely by its selection of speakers allowed to use the billing envelope. This indirect content regulation "cannot be tolerated under the First Amendment." *(Carey v. Brown,* 447 U.S. 455, 463 (1980).)

[18] The commission's own words indicate that it judged content:

> Based on the evidence and arguments presented in this proceeding, *we believe that,* in *general, TURN's proposals are meritorious.* Under each proposal, residential ratepayers . . . would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. *We believe that this would be an appropriate and efficient use of the extra space.* (Dec. No. 83-12-047; J.S., app., p. 16.) (emphasis added).

PGandE's. Selecting TURN or any other person as the speaker to use the envelope involves improper content censorship. In *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972), Chicago selectively allowed certain groups to picket near schools, but denied that right to all other groups. Chicago argued that its ordinance was "not improper content censorship." (*Id.* at 99.) But, Justice Marshall, writing for the Court, found otherwise. "Freedom of expression . . . would rest," said Justice Marshall, "on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorized basis." (*Id.* at 101.) "Once a forum is opened to . . . speaking by some groups, government may not prohibit others from . . . speaking on the basis of what they intend to say." (*Id.* at 96.) Although this important principle was ignored by the commission's majority, it was strongly emphasized by Commissioner Bagley in his dissent:

> As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. *Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope.* (Dec. No. 84-05-039; (Bagley, dissenting) J.S., app., p. 56.) (emphasis added).

To carry out the commission's edict, government will be required not only to pick and choose from the multitude of competing groups, but also to resolve the numerous disputes that will inevitably arise because of what the various groups, both political and nonpolitical, will wish to say. Thus, government will license speakers to use the envelope based solely upon what they intend to say.[19]

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[19] In granting TURN access to appellant's billing envelope, the commission takes on the awesome and completely unmanageable task of picking and choosing from the multitude of competing interests, including political groups, who may wish to communicate through PGandE's envelope. For example, on October 17, 1984, in *Committee of More*

Recently, a New York Supreme Court (County of Albany) held unconstitutional a New York Public Service Commission policy granting consumers the right to publish their messages in utility billing envelopes. Finding the New York policy to be dangerous, the New York court said:

> Under the Commission's policy, the Commission has the right to decide what groups (CUBs) will have access to the Utilities' billing envelopes. . . . Herein lies the danger; not whether the Commission in its good intention desires to give equal opportunity to the consumers in expressing their views, but allowing itself to enter the arena of public opinion. Under the Commission's statement, it has authority to determine what will be objectionable and to some degree what will be included in petitioners' envelopes.
>
> In the opinion of this Court an ominous threat presents itself to the First Amendment in allowing a governmental agency the right to license others in the use of another's property especially where the use of such property pertains to ideology which may oppose the views of such owner. (*Consolidated Edison Co. v. Public Service Comm'n.*, ____ Misc. 2d ____, ____ N.Y.S. 2d ____, Albany County Spec. Term Calendar Nos. 14, 15, 16, 17, 31, 39, 44, slip op., at pp. 8-9 (April 10, 1985).)

Than 1 Million California Taxpayers To Save Prop. 13 v. Pacific Gas and Electric Co., (Dec. No. 84-10-062; J.S., app., pp. 157-164), the commissioners denied the request of a political group to insert material into utility billing envelopes. The denial was because: (1) the group did not properly allege it has participated or intends to participate in commission proceedings; and (2) the political group seeking use of the "extra" space did not allege that the group's use would improve consumer participation in commission proceedings. (*Id.* at 161.) Thus, it is indeed clear that speakers will be selected by the commission based upon "what they intend to say." (*Police Department of Chicago v. Mosley*, 408 U.S. at 96.)

In a concurring opinion, Commissioner Calvo stated that he would reject the request of the political group because he is not convinced that any group is entitled to "invade a public utility's billing envelope to convey their messages" and because he believes "other media and forums exist that are better suited to carry those messages. . . ." (*Id.*, (Calvo, concurring); J.S., app., p. 163). Commissioner Bagley concluded that " . . . I continue to believe that any and all such assignment of envelope space by this Commission to other entities is a deprivation of the constitutional rights of the subject utility companies." (*Id.* (Bagley, concurring); J.S., app., p. 164)

In the instant case the commission ignored its own similiar warning expressed in a prior decision where it said restricting PGandE's use of the extra space and substituting "other speech, composed by the Commission, interested public participants s.ch as TURN or other parties" (Dec. No. 93887; J.S., app., p. 70) could "simply be a substitute of one form of speech for another, a preference for governmentally sponsored or *governmentally allowed speech*. Such a preference *could be more dangerous than the evil* which TURN seeks to correct." (*Id.*) (emphasis added). By selecting speakers for PGandE's billing envelope, the commission now has done exactly what it previously warned "could be more dangerous than the evil" (*Id.*) it wanted to correct.

II

THE STATE'S JUSTIFICATION FOR RESTRICTING APPELLANT'S FIRST AMENDMENT RIGHTS DOES NOT MEET THE TEST FOR REGULATING SPEECH.

A. The Commission's Order Is Impermissible Under the Standards for Regulating First Amendment Activity.

1. The Necessity of Meeting the Compelling Interest Standard Applies Even Though Appellant Is a Regulated Monopoly.

This Court has consistently held that when First Amendment rights are abridged the normal presumptions of constitutionality do not apply, and the state bears the heavy burden of showing the existence of a compelling governmental interest sufficient to justify any abridgment. (See *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State* (*Town of Irvington*), 308 U.S. 147 (1939).) In *Citizens Against Rent Control v. Berkeley*, 454 U.S. at 294, the Court

specifically stated "that regulation of First Amendment rights is always subject to exacting judicial review." Thus, the commission bears the heavy burden of demonstrating the existence of a compelling governmental interest sufficient to justify its order granting TURN access to appellant's envelope. (See *Elrod v. Burns*, 427 U.S. at 362.) This burden was not met in the proceedings below.

Rather than meeting its heavy burden of producing evidence to demonstrate a compelling interest for its regulation, the commission merely concluded that "[i]n the present matter a compelling state interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulates that use in a constitutionally permissible way." (Dec. No. 83-12-047; J.S., app., p. 22) In fact, the commission does not, and indeed cannot, cite to any evidence in the record to support its conclusion. Instead, it relies heavily upon appellant's status as a regulated monopoly as a basis for ordering it to publish TURN's message. (*Id.*; J.S., app., pp. 26-27.) Such reliance incorrectly assumes that "monopoly" status restricts the application of the First Amendment and gives the commission unlimited authority to regulate appellant. As explained by the commission, "even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to the authority derived from the State's constitution." (Dec. No. 84-05-039; J.S., app., p. 52.) "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interest of a government in overseeing the use of its property." (*Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. at 540.) *Consolidated Edison* expressly rejected, as must be done here, the New York Public Service Commission's reliance upon a utility's status as a heavily regulated monopoly as a basis for denying First Amendment freedoms.[20]

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[20] *Consolidated Edison* rejected the commission's premise:

> *Nor does Consolidated Edison's status as a privately owned but government regulated monopoly preclude its assertion of First Amendment rights.* [citation omitted] We have recognized that the speech of heavily regulated businesses may enjoy constitutional protection. [citation omitted] Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters. [citation omitted] (447 U.S. at 534, n. 1.) (emphasis added).

In *First National Bank of Boston v. Bellotti, supra,* 435 U.S. 765, the Court explained that government's ability to restrict speech "by corporations turns on whether it [the regulation] can survive the exacting scrutiny necessitated by a state-imposed restricton of freedom of speech." (*Id.* at 786.) Moreover, "the State may prevail only upon showing a subordinating interest which is compelling" (*Bates v. Little Rock*, 361 U.S. 516, 524 (1960)), and "the burden is on the government to show the existence of such an interest." (*Elrod v. Burns*, 427 U.S. at 362.) Not only must the State demonstrate a compelling interest, but it must also employ means "closely drawn to avoid unnecessary abridgment. . . ."[21] (*Buckley v. Valeo*, 424 U.S. at 25; see also, discussion *infra pp.* 36-40.) The commission's order cannot survive this test.

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[21] In *Citizens Against Rent Control v. Berkeley*, 454 U.S. at 302 (Blackmun, J. and O'Connor, J., concurring), it was noted that the City of Berkeley's limitation on campaign contributions could not survive a constitutional challenge unless it withstood "exacting scrutiny." Justices Blackmun and O'Connor (concurring) correctly stated the standard of review that the Berkeley ordinance had to survive: "To meet this rigorous standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means closely drawn to avoid unnecessary abridgment of First Amendment freedoms." [citation omitted] (*Id.* at 302, (Blackmun, J. and O'Connor, J. concurring).) As Justice Marshall, also concurring in the *Berkeley* case pointed out, the evidence of the significant governmental interest narrowly drawn must be in the record. (*Id.* (Marshall, J. concurring).) Of course, in the instant case, as in *Berkeley*, there is "no such evidentiary support in this record." (*Id.*)

2. A Redefinition of the Ownership of the Extra Space Cannot Alleviate the State's Burden of Showing That the Regulation Is Permissible.

(a) Regardless of Ownership of the Extra Space, the State Must Show That Its Regulation Meets Constitutional Standards.

Below, the commission held that appellant's constitutional challenge to its order was resolved by its holding that the envelope extra space is ratepayer property. (Dec. No. 83-12-047; J.S., app., pp. 3, 27.) The basic flaw of this holding is that it characterizes the extra space as space or "property" that exists in a vacuum separate and apart from the billing envelope itself, which the commission acknowledges belongs to PGandE. (Dec. No. 83-12-047; J.S., app., pp. 2-3.) The reality, however, is that the extra space exists solely because of the nature of the billing envelope and how postage rates are calculated. Extra envelope space is an inseparable part of the envelope. It cannot be utilized by TURN or anybody else without a physical invasion of appellant's envelope.

The outcome of this case does not depend upon the ownership of the extra space. Because, regardless of how the ownership of that extra space is defined, the commission's regulation of what goes into appellant's billing envelope must still meet constitutional standards.[22] *Consolidated Edison,* in holding that the regulation of a utility's billing envelope must be governed by the state's ability to "demonstrate that its regulation is constitutionally permissible", (447 U.S. at 535) rejected the underlying premise of the commission's ownership rationale. Under the

[22] According to the commission's analysis, constitutional standards may be evaded by merely redefining the property interest in the envelope extra space:

> In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. (Dec. No. 84-05-039; J.S., app., p. 52.) (emphasis in original).

commission's rationale a state can overrule *Consolidated Edison* by a simple redefinition of the utility's rights in its property. It matters not to the commission whether the protected rights involve the utility's extra space on the sides on its vehicles, its office extra space or its billing envelope extra space. Because, a state can regulate, in the commission's view, those rights by merely declaring the property to be that of ratepayers rather than shareholders. If this logic is correct, then *Consolidated Edison's* holding is, indeed, illusory. First Amendment rights of utilities would rest upon mere definitions of their interest in property rather than upon established constitutional principles. This "strikes at the heart of the freedom to speak." (*Id.*)

Finally, under the less rigorous standards set forth in *Central Hudson,* a state may regulate utility speech only if it asserts a substantial interest and "the regulatory technique [is] in proportion to that interest." (*Id.* at 564.) *Central Hudson* makes clear the standards for regulating utility speech:

> First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction . . . the excessive restrictions cannot survive. (*Id.*)

Therefore, when measuring state regulation against required constitutional standards,[23] ownership of the extra space is irrelevant.

[23] The *Central Hudson* standard is as follows:

> In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. (*Central Hudson*

A state cannot evade constitutional standards by redefining the activity (extra space) regulated.

(b) The Holding That Customers Buy Extra Envelope Space When They Pay Their Utility Bills Directly Conflicts With Decisions of This Court.

The commission did not cite, nor could it, a single case for its conclusion that customers purchase extra envelope space when they pay their utility bills. Instead it surmised that "the extra space is a byproduct of the billing process which is paid for by ratepayers" (Dec. No. 84-05-039; J.S., app., p. 52); and therefore "the extra space is not 'property held by [PG&E] in ownership' " (Dec. No. 83-12-047; J.S., app., p. 26), but rather property that belongs to ratepayers.(*Id.*) If payments for utility service purchase an interest in the extra envelope space, it logically follows that such payments also buy a similar interest in extra utility vehicle space, office space, computer capacity and in other facilities used to render customer service. The commission's holding is so contrary to law that it merits little, if any, serious discussion.[24] It conflicts directly with *Board of Public Utility Comm'rs. v. New York Telephone Co.*, 271 U.S. at 32 where this Court specifically found that:

Gas & Electric Corp. v. Public Utilities Comm'n.,447 U.S. at 566.)

[24] In a recent law review article, the author opined that the commission's ownership analysis is simply incorrect:

> The fact ratepayers pay for envelope and postage costs is an insufficient reason to give them rights to extra envelope space. Consumers may not take property rights to a company's service and billing mechanism merely because they pay for the mechanism. . . . Utility property rights are those of the investors and exist apart from regulation. Without regulation, envelopes used by the utility would be utility property. Because regulation does not transfer property rights, *a* regulated utility's billing envelopes still belong to the utility. *Access To Public Utility Communications: Limits Under The Fifth And First Amendments,* (21 *San Diego Law Review* 391, 397-399 (1984).) (emphasis added).

> Customer pay for service, not for the property used to render it. *Their payments are not contributions to depreciation or to other operating expenses,* or to the capital of the company. By paying bills for service *they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.* (emphasis added).

"Customers are entitled to demand service and the company must comply." (*Id.* at 31.) But, the "relationship between the company and its customers is not that of partners, agents and principal, or trustee beneficiary." (*Id.*) Utility property "although devoted to the public service and impressed with a public interest is still private property."[25] (*United Railways and Electric Company of Baltimore v. West,* 280 U.S. 234, 249 (1930), was overruled on other grounds in *Federal Power Comm'n. v. Hope Natural Gas Co.,* 320 U.S. 591 (1944).) In *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'n.,* 262 U.S. 276 (1923), the Court explained what the commission below ignored:

> It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with general power of management incident to ownership. (*Id.* at 289.)

The First Amendment would indeed rest upon "a soft foundation" (*Police Department of Chicago v. Mosley,* 408 U.S. at 99)

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[25] This is an elementary principle of utility regulation which the commission below rejects. (See *Philadelphia Suburban Water Company v. Pennsylvania Public Utility Comm'n.,* 487 A.2d 1244 (1981); *Village of Wellsville v. Maltbie,* 15 N.Y.S.2d 580, 585 (1930).) In *Duke Power Company,* (Opin. No. 641, 48 FPC 1384, (Dec. 18, 1972)), the Federal Power Commission (now the Federal Energy Regulatory Commission) observed: "Property paid for out of monies received for service belongs to the Company just as that purchased out of proceeds of its bonds and stocks." (*Id.* at 1395.)

if government could simply redefine interest in utility property to evade constitutional standards. Today, a majority of the commission says appellant has no First Amendment rights in the extra envelope space because customers purchase that space when they pay for their utility service; tomorrow, a different commission majority is free to hold otherwise. First Amendment rights cannot rest upon such a fragile foundation.

B. The Commission's Identified Interests Are Neither Compelling Nor Substantial.

Although there is no evidence in the record to support its conclusion, the commission in its Motion to Dismiss, nevertheless, sets forth a laundry list of alleged interests for regulating the contents of PGandE's envelope:[26]

> It promotes full and effective consumer participation in CPUC proceedings. App. A27, A35, A36. It enhances the accuracy of the fact-finding process by "tend[ing] to enhance the record in [such] proceedings." App. A36. It provides information about consumer organizations. . . . App. A20-A21, A27, A36. It advances the ratepayers' state and federal constitutional rights to receive ideas and information, based on the assumption "that the ratepayers will benefit more from exposure to a variety of views than they will from only [those] of PG&E." App. A22. It provides added protection for the particular interests of residential ratepayers and other specific ratepayer groups. . . . App. A20. It limits the ratepayers' compelled subsidy of utility speech in violation of PURPA. App. A3-A4. [citations omitted] It halts PG&E's misappropriation of an asset which belongs to the ratepayers

[26] Since there is no evidence in the record concerning most of these alleged interests, the commission's order cannot be sustained. "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (*SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); see also, *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249 (1972).)

> and the utility's consequent unjust enrichment. App. A4. And it promotes fair and efficient rates, the overall objective of the regulatory scheme. [citations omitted] (Commission's M.D., pp. 17-18.)

These eight (8) identified, and largely redundant alleged interests, are neither compelling nor substantial. They fall far short of the test required by *Consolidated Edison* and *Central Hudson* for regulating utility speech. Moreover, the Court already, in *Buckley v. Valeo, supra*, 424 U.S. 1, has rejected almost all of these alleged governmental interests as insufficient to regulate First Amendment rights. For example, in *Buckley*, the government sought to promote a more balanced market place of ideas by limiting the amount that could be expended in certain political campaigns, therefore, curtailing the speech of those who had the means to communicate. The stated governmental interests in *Buckley* were almost identical to most of the commission's asserted interests in enhancing TURN's voice in order to achieve fuller consumer participation and understanding of commission proceedings.[27] Yet, the *Buckley* Court found such interests could not support infringement of speech because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." (*Id.* at 48-49.) Here, more

[27] In *Vermont Public Interest Research Group* v. *Central Vermont Public Corp.* 39 PUR 4th 59 (1981) the State of Vermont rejected similar interests as being insufficient to grant a right of access:

> Underlying all of petitioners' arguments is the assumption that government has an obligation to ensure that a wide variety of views reach the public and that all ideas should be guaranteed by the government of (sic) equal access to the "marketplace of ideas." While the First and Fourteenth Amendments ban government from interfering in any way with free speech or press, government is not required to ensure that all ideas have equal standing. *The First Amendment, rather than justifying a government imposed obligation to publish, protects individuals and corporations from being compelled by the government to publish that which they do not wish to publish.* (*Vermont Public Interest Research Group* v. *Central Vermont Public Service Board, supra*, 39 PUR 4th, at pp. 72-73.) (emphasis added.)

so than in *Buckley*, the state's alleged interests in improving the flow of ideas are perniciously pursued not only by commandeering appellant's billing envelope, but also by appropriating some of appellant's resources to enhance TURN's voice.[28]

The commission's confusion about the First Amendment's application is illustrated by its argument that the "state's interest in accommodating the First Amendment and state constitutional rights of its citizens is 'compelling.' " (Commission's M.D., p. 20, n. 22; see also, p. 19, n. 20.) *Widmar v. Vincent*, 454 U.S. 263 (1981) is cited for this proposition. But *Widmar* does not support the argument. The issue in *Widmar* was once the University of Missouri had "opened its facilities for use by student groups ... whether it [could] now exclude [other] groups because of the [religious] content of their speeches." (454 U.S. at 273.) *Widmar* specifically declined to adopt the position argued by the commission: "it is ... unnecessary for us to decide whether ... a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment." (*Id.* at 275-276.) Moreover, the Court in *Widmar* refused to recognize the State's interest there in achieving greater separation of church and State "as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." (*Id.* at 276.)

Finally, the remainder of the commission's laundry list of alleged interests amounts to nothing more than speculation of harm to consumers if TURN is not granted access to PGandE's envelope. "Mere speculation of harm does not constitute a compelling state interest." (*Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. at 543.) And, even if the stated interests constitute (which they do not in this case) compelling or substantial state interests, the method chosen to accomplish them is

[28] For example, the commission mandated:
In addition to ordering PGandE to make space available, *we are also ordering it to do one thing further, and that is to use its equipment* to put the inserts of others into the billing envelope extra space. (Dec. No. 83-12-047; J.S., app., p. 23.) (emphasis added).

neither narrowly tailored to serve the stated purposes (*Consolidated Edison, supra*, 447 U.S. 530) nor does it "directly advance the state interest[s] involved." (*Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. at 564.) Even if legitimate, which they are not, all of the identified governmental interests could be easily achieved by means which do not in any way infringe PGandE's First Amendment rights.

C. The Commission's Order Is Not Narrowly Drawn; It Ignores Readily Available Alternatives That Do Not Restrict Speech at All.

Consolidated Edison held that restrictions on utility speech "may be sustained only if government can show that the regulation is a precisely drawn means of serving a compelling state interest." (447 U.S. at 540.) Ordering PGandE to publish TURN's messages is not "precisely drawn." Rather, it broadly stifles fundamental First Amendment rights. In *Shelton v. Tucker*, 364 U.S. 479 (1960) the Court emphasized that even if "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." (*Id.* at 488.)

Even when non-First Amendment rights are restricted, this Court adheres to the doctrine that if the government has available a variety of equally effective means of achieving a given end, it must choose the method which least interferes with individual liberties.[29] The commission, however, has completely ignored this doctrine and chosen a most drastic means for achieving its alleged interests.[30] But as emphasized in *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973):

[29] E.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 507-508 (1964); *Dean Milk Company v. City of Madison*, 340 U.S. 349, 354 (1951); see also, Comment, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1968).

[30] In *Vermont Public Interest Research Group, Inc. v. Central Vermont Public Corp.*, 39 PUR 4th 59 (1981), the Vermont Public Service

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. [citation omitted] '*Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.*' [citation omitted] If the state has opened to it a less drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. [citation omitted.] (emphasis added).

The commission's laundry list of alleged state interests could be equally or perhaps better served by a multitude of other means which do not infringe at all upon appellant's First Amendment rights. For instance, awarding attorney or intervenor fees to successful intervenors would provide a direct incentive and reward for participation in commission cases.[31] Fee awards also allow the

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Board was requested to provide an identical right of access to the utility billing envelope. Rejecting the request, Vermont held that:

> Not only would a right of access policy in respect of the utility billing process inevitably curtail the very freedoms that petitioners assert would be enhanced, the administration of a right of access policy would be simply impractical. Parceling out the right to use the utility bill among every would-be pamphleteer and politician would be, *as a practical matter, impossible, subjecting the board to charges of favoritism and exposing it to endless litigation.* (*Id.* at 72.) (emphasis added).

[31] The Public Utility Regulatory Act (PURPA) provides a basis for adopting rules for awarding reasonable fees and costs to intervenors making contributions in specified areas in proceedings involving electric utilities. (16 U.S.C. § 2632 (1978).) The commission has adopted rules to implement this legislation. (See Rule 76.01 et seq. of the Commission's Rules of Practice and Procedure reprinted in the Appendix to the Jurisdictional Statement.) (J.S., app., pp. 165-182.) Also, on July 5, 1984, California's Governor signed into law Intervenor's Fees and Expenses legislation which authorizes the commission to award reasonable advocate's fees, expert witness fees, and other cost of participation or intervention in any hearing or proceeding before the commission relating to utility rates. (See 1984 Cal. Legis. Serv. Ch. 297 (West); J.S., app., p.151.) Since 1982, the commission has awarded TURN $164,321.72.

commission to ensure that the dollars received are related to the commission proceeding involved. Moreover, such awards allow an unlimited number of groups, not just TURN, to be eligible to receive fees for participating in commission proceedings based upon judicially accepted standards. This would foster wider participation in commission proceedings and would not require that government pick and choose or license the speakers.

If, as claimed by the commission, an additional interest sought to be served by the commission's order is to prevent PGandE from receiving a "free ride" in the billing envelope and to limit "compelled subsidy of utility speech" (commission's M.D., p. 18), these interests can be easily served by means which do not restrict speech. For example, PGandE conceded in the proceeding below that "if forced subsidization is indeed the evil sought to be remedied, then assessing a reasonable value for the use of that [extra space] would remedy the problem. . . . " (*Reply Brief In Support of Petition for The Writ of Review of Pacific Gas and Electric Company*, S.F. No. 24734, (8/3/84) at 15, n. 8.) PGandE acknowledged below that "the commission [could] make reasonable allocations of cost for the extra space," (*Id.* at 14) if that is the interest to be served, because "[s]uch allocations occur routinely in utility ratemaking." (*Id.* at 14.) Allowing TURN and other organizations to use appellant's envelope restricts First Amendment rights. It is not a narrowly tailored means of serving a compelling state interest. It does nothing to limit forced subsidization of speech in the billing envelope. Instead it compels the subsidization of TURN's speech.

Commissioner Calvo (dissenting) correctly observed that there are numerous alternatives which do not restrict speech that are available for the commission to achieve its alleged interests other than publishing TURN's message in PGandE's envelope:

> TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently

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At the present, another consumer oriented group is seeking $856,265.00 in intervenor fees.

> used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. (Dec. No. 84-05-039, (Calvo, V., dissenting,) J.S., app., p. 56.) (emphasis in original).

Finally, it must be emphasized *again* and *again* that even if the commission's purpose is legitimate and represents a compelling or substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." (*Shelton v. Tucker,* 364 U.S. at 488.) The decision below fails this test.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of California, upholding the decision of the commission, should be reversed; and the commission's decision should be vacated.

Respectfully submitted,

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